Supreme Court, U.S.
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No. 93-62

In The

Supreme Court of the United States

October Term, 1993

ROBERT J. COAR,

Petitioner,

vs.

JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, DONATO DeSANTI, and ROBERT DUDIK, as Trustees of the Pension Fund Mid-Jersey Trucking Industry-Local 701, and PENSION FUND MID-JERSEY TRUCKING INDUSTRY LOCAL 701,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions here presented under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") are:

1. Does the bar on "alienation" in § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), encompass a set-off by the Pension Plan itself — as opposed to a garnishment, levy or attachment by a third party creditor — against a fiduciary's pension benefits, so as to recoup the losses caused to the Plan by that fiduciary's breach of his fiduciary duties owed to the Plan under ERISA?

2. Does § 409(a) of ERISA, 29 U.S.C. § 1109(a), afford the Plan the equitable and remedial remedy of a set-off and recoupment against a fiduciary's pension benefits from the Plan so as to recoup the Plan's losses caused by the fiduciary, which remedy supersedes the more general bar on "alienation" of benefits in § 206(d)(1) of ERISA?

3. Does a construction of § 206(d)(1) of ERISA as insulating the pension benefits of a Plan fiduciary who has depleted and misappropriated funds from the Plan against remedies by the Plan against the fiduciary under § 409(a) yield an "absurd" result that could not have been intended by Congress?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. Pa 1-41) is reported at 990 F.2d 1413. The opinion of the district court below (Pet. App. Pa 42-69) is reported at 792 F. Supp. 345.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 15, 1993. A petition for rehearing was denied on May 11, 1993. The petition for a writ of certiorari was filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Relevant Facts

In 1986, Petitioner Robert J. Coar ("Coar"), a former trustee and current participant of the Pension Fund, Mid-Jersey Trucking Industry, Local 701 (the "Pension Fund" or the "Fund") was convicted, along with his co-trustee and the general counsel of the Fund, of engaging in a conspiracy among themselves and with others in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to misappropriate $20 million (twenty percent) of the Fund's assets to invest in a sham investment for their and their co-conspirators' benefit. The conviction was affirmed on appeal in *United States v. Zauber, Coar and Scotto,* 857 F.2d 137, 140, 149-53 (3rd Cir. 1988), *cert. denied,* 489 U.S. 1066 (1989). The criminal case and the uncontradicted evidence in the district court below showed that, as part of the RICO conspiracy, petitioner Coar personally received a portion of the Fund's misappropriated assets in the form of kickbacks.[1]

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1. Despite the statements in the Petition as to petitioner's age and financial

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In October 1984, prior to the indictment, the Fund and its new trustees filed a civil case against Coar, his co-conspirators, and certain other defendants, alleging ERISA and RICO violations arising from the $20 million misappropriation. On September 13, 1990, the district court in that prior civil case granted summary judgment on liability for the Fund against Coar and others. Ultimately, the district court in the prior civil case entered a final, unappealed judgment against Coar for $25,535,887 for fiduciary duty violations under §§ 409(a) and 502(a) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a), and a judgment for $96,607,661 for RICO violations.[2]

On April 16, 1991, prior to the entry of the final judgment against Coar in the prior civil action, but after the court had found Coar liable, the Pension Fund advised Coar that it would set-off and recoup Coar's liability to the Pension Fund against his benefits from the Fund, beginning with the May 1991 benefits payment. This determination was made pursuant to a number of provisions in the Pension Fund's Trust Agreement and Pension Plan which gave the Fund's trustees broad discretion: (a) to construe and administer

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(Cont'd)
condition, no competent evidence was ever submitted on these subjects. Indeed, under a claim of Fifth Amendment privilege, petitioner has consistently refused to be deposed and has never signed an affidavit as to the particulars of his financial status or that of his alleged dependents, or on any other subject. Moreover, in the proceedings below the Pension Fund stipulated that this case does not, and could not, have any effect on the "survivor" or any other pension benefits from the Fund enjoyed by petitioner's spouse or children (Pet App. at Pa 5 n.2; Resp. App. at Ra 13a).

2. The $25,535,887 damage figure represented the unrecovered portion of the misappropriated $20 million (net of any settlements in litigation to recover its assets), plus what the Fund would have earned had the Fund's assets continued to be invested with the Pension Fund's regular investment managers, pursuant to § 409(a) of ERISA.

the Trust and Plan as imposing no greater obligation on the Fund than that imposed by law under ERISA; (b) to take a set-off against future benefits for prior overpayments to a participant; and (c) to determine the facts in connection with any "benefits" claim or determination.[3]

B. Proceedings Below

On July 17, 1991, petitioner Coar filed this action against the Fund to obtain his pension benefits under § 502(a)(1) of ERISA, 29 U.S.C. § 1132(a)(1). Coar claimed that the Fund's withholding of benefits violated the non-forfeiture and anti-alienation provisions of ERISA, §§ 203(a) and 206(d)(1), 29 U.S.C. §§ 1053(a) and 1056(d)(1). The Fund Defendants[4] answered and filed a counterclaim seeking a declaratory judgment that the Pension Fund's withholding of benefits under §§ 409(a) and 502(a) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a), did not violate ERISA's non-forfeiture and anti-alienation provisions. The parties each moved for summary judgment.

On May 12, 1992, the district court issued an opinion holding that, although the non-forfeiture provision of ERISA did not bar the set-off, the anti-alienation provision forbade a set-off by the Pension Fund for its losses and damages caused by Coar. *Coar v.*

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3. When the trustees determined to offset petitioner's § 409(a) liability to the Fund against petitioner's benefits, in April 1991, the Pension Fund had already obtained extensive damage studies showing a loss in excess of $25 million to the Fund resulting from petitioner's malfeasance. Based upon these very damage studies, the district court in the prior civil case ultimately entered a final judgment against Coar in excess of $25 million on the Fund's ERISA fiduciary duty claims, and in excess of $96 million on its RICO claims.

4. The Fund Defendants are Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti, and Robert Dudick, Fund Trustees, and the Pension Fund of the Mid-Jersey Trucking Industry, Local 701.

Kazimir, 792 F. Supp. 345 (D.N.J. 1992) (Pet. App. Pa 42-59). The district court denied the Fund's motion for summary judgment and granted summary judgment to Coar, together with an award of attorneys' fees under § 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1). *Id.* On May 20, 1992, on defendants' motion for reconsideration of the summary judgment decision and the attorneys' fee award, the district court reaffirmed its summary judgment decision, but reversed the fee award to Coar (Pet. App. Pa 62-69). The district court entered final judgment for Coar on June 23, 1992 (Pet. App. Pa 60-61). The Fund Defendants appealed the entry of summary judgment. Petitioner did not appeal the District Court's finding of no forfeiture under § 203 of ERISA.

Despite petitioner's somewhat hyperbolic description of the decision of the court of appeals, the Third Circuit conducted a detailed and painstaking statutory analysis to arrive at its conclusion. *Coar v. Kazimir*, 990 F.2d 1413 (3rd Cir. 1993) (Pet. App. Pa 1-35). The court recognized that this case differed from *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), in that it required the interpretation of two provisions of the *same statute*. *Coar, supra*, 990 F.2d at 1419 (Pet. App. Pa 18-19). As a result, the Third Circuit determined that the purpose of the statutory analysis was to reconcile the two sections of the same statute and apply both without undermining the purpose of either provision. *Id.*

The court below analyzed both sections of the statute here at issue in order to arrive at a rational and harmonious interpretation of their provisions. *Id.* at 1420 (Pet. App. Pa 19). Following this Court's analysis in *Guidry*, the Third Circuit found that the more specific mandate in § 409(a) to remedy losses caused by fiduciary breaches was a better indicator of Congressional intent than the more general bar on alienation under §206(d)(1). *Id.* at 1420 (Pet. App. at Pa 20). Moreover, as the court below noted, allowing a breaching fiduciary to collect benefits would effect a further

depletion of the Fund's assets available to pay beneficiaries, in direct contravention of the purpose of the anti-alienation provision as stated in the legislative history. *Id.* at 1421 (Pet. App. at Pa 20-21). Thus, the court below concluded that § 206(d)(1) did not limit the remedies available under § 409(a) to assure that breaching fiduciaries make good the losses and damages they have caused pension funds. *Id.* at 1420-21 (Pet. App. at Pa 21).[5]

The court below also examined the meaning of the term "alienation" as used in § 206(d)(1). After a careful study of the legislative history of that section, the regulations enacted by administrative agencies thereunder, and the relevant case law, the court held that the set-off employed by the Fund in this case was not an "alienation" within the meaning of § 206(d)(1) because it was not a garnishment, levy or attachment by a third party creditor. The Fund's action here amounted only to a netting out or offsetting of accounts or mutual debts between the Fund itself and its own trustee/beneficiary. *Id.* at 1421-23 (Pet. App. Pa 21-25). Thus, the court below concluded that the traditional trust remedy of applying a breaching trustee/beneficiary's benefits to offset his or her liability to the Fund was not barred by § 206(d)(1) because such an offset was not an "alienation" under § 206(d)(1). *Id.* at 1422 (Pet. App. Pa 24).

Finally, the Third Circuit also addressed the policy concerns raised by the Supreme Court in *Guidry, supra,* 493 U.S. at 375, against creating "general equitable exceptions" to an "anti-garnishment" rule. *Id.* at 1422 (Pet. App. Pa 25). While acknowledging that it was unnecessary in this case to find that § 409(a) overrides § 206(d)(1), the court below concluded that this

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5. Contrary to petitioner's contention that the court of appeals cited no authority (Pet. at 11), the court quoted from the text of § 409(a) and found that the phrase "other equitable or remedial relief" provided ample basis and authority for its finding that § 409(a) should control over § 206(d)(1).

Court's admonition against creating "generalized equitable exceptions" to § 206(d)(1) was simply not applicable here. *Id.* The court of appeals reversed the judgment of the district court and remanded the case for the entry of judgment pursuant to its opinion.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS CORRECTLY REASONED AND DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *GUIDRY.*

The opinion of the Third Circuit reflects a careful and detailed consideration of §§ 409(a) and 206(d)(1) of ERISA that is in full accord with the statutory analysis of this Court in *Guidry.* The court of appeals correctly reversed the district court and held that in these circumstances ERISA does permit a pension fund to withhold the benefits of a breaching fiduciary to offset or recoup losses that the fiduciary's breach caused the fund. The decision of the court below was rooted in the plain meaning of the statute, as well as the relevant legislative history. Further review is not necessary.

Petitioner contends that the Third Circuit's decision ignores the admonition of *Guidry* against creating "general equitable exceptions" to the anti-alienation provisions of ERISA as an "anti-garnishment provision," and that the decision will undermine the protection of benefits afforded by § 206(d)(1) (Pet. 7-8, 21). Both the transcript of oral argument before the court of appeals and the court's opinion demonstrate the error in these contentions. As was plainly established at oral argument (Resp. App. at Ra 5), respondents do not seek any "equitable exception" to § 206(d)(1),

and the Third Circuit was well aware of *Guidry's* proscription of such exceptions when it decided this case (Resp. App. at Ra 6).

Rather, the court of appeals properly sought to balance the specific language and remedies of § 409(a), dealing specifically with remedies against breaching fiduciaries, against the more general language and proscription of § 206(d)(1), generally dealing with benefits for all participants, not just fiduciaries (Resp. App. at Ra 5-6). No general or equitable exception to alienation, such as that proposed and rejected in *Guidry,* was necessary to resolve this case (Resp. App. at Ra 5). Furthermore, while recognizing the necessity of maintaining strict limits on equitable exceptions to the "anti-garnishment" rule, the Third Circuit specifically found that no danger of inviting "all sorts of third party claims" existed in this case. *Coar, supra,* 990 F.2d at 1422 (Pet. App. at Pa 25-26).

Thus, contrary to petitioner's argument (Pet. 10-11), the Third Circuit's statutory analysis reveals a careful effort to examine the plain meaning of the statute, and the relevant legislative history, consistent with the very principles set forth in *Guidry.*[6] The decision below is also consistent with this Court's most recent decision in *Mertens v. Hewitt Associates,* __ U.S. __, 113 S.Ct. __, 124 L. Ed. 2d 161 (June 1, 1993), in which both the majority and

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6. Petitioner's reliance on this Court's decision in *Patterson v. Shumate,* __ U.S. __, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992), is plainly misplaced. *Patterson* is not controlling in this case because, like *Guidry,* it did not involve a trustee who had breached a fiduciary duty to the pension fund. *See Patterson, supra,* 112 S. Ct. 2242. The issue in *Patterson* was whether a third party creditor (the trustee of the beneficiary's bankruptcy estate) could require that the benefits be paid to the bankruptcy estate rather than the beneficiary. *Id.* The Court held that, under the Bankruptcy Code (11 U.S.C. § 541(c)(2)), the pension benefits were not subject to the claims of the bankruptcy estate. Thus, *Patterson* did not involve a reconciliation of §§409(a) and 206(d)(1) of ERISA and has no relevance to the issues presented in this case. The case is entirely inapposite.

dissenting opinions recognized the broad scope of "other equitable or remedial relief" under § 409(a) of ERISA. 124 L. Ed. 2d at 170-171 n.8 and 179 n.4.

Moreover, petitioner does not address the court of appeals' analysis of the term "alienation," as used in § 206(d)(1), or its conclusion that it does not apply to the situation at hand. *Id.* at 1421 (Pet. App. Pa 24). Petitioner has chosen to critique only the Third Circuit's finding that § 409(a) is the more specific of the two provisions at issue, and has offered no grounds for reviewing the lower court's holding regarding the scope of the anti-alienation provision under § 206(d)(1). Petitioner misreads the Third Circuit's holding on the scope of the term "alienation" as mere *dicta* in support of its specificity analysis (Pet. 11). To the contrary, the finding that "alienation" does not even apply to the actions of the Fund in this case provides an additional independent basis for the court's decision.[7] The court of appeals correctly distinguished a levy, execution, garnishment or other collection process by a third party creditor from attempts by the Fund itself to recoup or offset amounts owed to it against "its own obligation" to the beneficiary in question. *Id.* at 1421 (Pet. App. Pa 23-24). Given that a set-off or recoupment is merely a "netting" out of mutual debts, to arrive at a "net" due to one party, there simply is no levy, execution or garnishment within the meaning of "alienation" under § 206(d)(1).

Petitioner also fails to mention that the agency charged with administering and construing the "anti-alienation" provision of ERISA has issued regulations that fully support the Third Circuit's view of the scope of the term "alienation" under § 206(d)(1).

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7. The court below relied upon the reference in ERISA's legislative history to "levy or garnishment" and on *Guidry's* characterization of § 206(d)(1) as an "anti-garnishment provision" in interpreting this provision. *See* Opinion, *supra*, 990 F.2d at 1420-21.

Under this Court's decision in *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Third Circuit properly afforded weight and deference to the controlling "anti-alienation" regulations issued by the Internal Revenue Service under 26 C.F.R. § 1.401(a)-13(b)(1)-(d)(2) (1992). *Id.* at 1421 (Pet. App. Pa 24).[8]

These IRS regulations expressly exclude from the definition of "alienation" actions by a fund itself "to apply or set-off pension benefits to recover debts owed by the participant to the plan. . . ." *Coar, supra,* 990 F.2d at 1422 (Pet. App. Pa 24). In light of this interpretation, and the language of § 206(d)(1) itself, requiring only that benefits not be "assigned or alienated," the court of appeals correctly concluded that the Fund's set-off and recoupment of the mutual debts in this case "was simply not an alienation within section 206(d)(1)". *Id.* Petitioner fails to offer any reason to review this determination, and offers no argument why the court of appeals' reading of § 206(d)(1) was incorrect — a concession fatal to his case for review.

II.

THE ISSUES PRESENTED HERE ARE NOT SUFFICIENTLY SIGNIFICANT TO MERIT REVIEW BY THIS COURT HAVING BEEN THE SUBJECT OF ONLY FOUR DECISIONS DURING THE NINETEEN-YEAR HISTORY OF ERISA, THREE OF WHICH ARE IN ACCORD WITH THE THIRD CIRCUIT'S DECISION BELOW.

As this Court is well aware, ERISA is a statute that has been the frequent subject of litigation since its enactment in 1974.

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8. Significantly, the court of appeals' analysis mirrors the analysis of this Court in *Guidry* which also relied upon the IRS regulations. *See Guidry, supra,* 493 U.S. at 685, n.10 (quoting 26 C.F.R. § 1.401(a)-13(b)(1) (1989)).

However, the issue presented by the instant petition has been the subject of only four reported decisions during the past nineteen years (since the adoption of ERISA), all but one of which are in complete accord with the decision of the Third Circuit below.[9] Petitioner himself admits that "most of the cases brought under § 409(a) do not involve fiduciary defendants who are also participants in the plan" (Pet. 7). Given that the purpose of certiorari is to resolve broad issues of general importance, rather than unique or *sui generis* cases, this case is not the proper subject of review by this Court. Given the infrequent treatment of the issue presented, this Court should await further development of the issue in the lower courts before addressing the issue.

Indeed, of the four decisions dealing with this rather obscure issue, only one has reached a different outcome, *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990), and that case was based upon a patently faulty reading of *Guidry*. Thus, the *Herberger* court failed to recognize that *Guidry* did not involve an "offset," but rather dealt with the imposition of a constructive trust which was in the nature of a "garnishment." *See Herberger, supra*, 897 F.2d at 803. Moreover, *Herberger* simply misread *Guidry* as holding "that the remedial provisions of *ERISA* did not outweigh the anti-alienation provision" and that "the civil enforcement provision, 29 U.S.C. § 1132(a)(3)(b) . . . was not expansive enough to allow an offset." *Herberger*, 897 F.2d 803-804. In fact, *Guidry* did not so hold and did not involve a balancing of the civil enforcement provisions of ERISA against its anti-alienation provision. *See Guidry, supra*, 493 U.S. 365. The statute invoked by the Union in *Guidry* was the Labor Management Reporting and Disclosure Act (LMRDA), not ERISA. *Id.*

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9. *See Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 943 (1988); *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990); *Pension Benefit Guar. Corp. v. Solmsen*, 743 F. Supp. 125 (E.D.N.Y. 1990).

While the analysis in *Herberger* was, thus, fundamentally flawed due to the Fifth Circuit's patent misreading of *Guidry*, the decisions in *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 943 (1988), and *Pension Benefit Guar. Corp. v. Solmsen*, 743 F. Supp. 125 (E.D.N.Y. 1990), suffer from no such flaw. Both of these decisions correctly recognized, as did the Third Circuit below, that an offset or recoupment of benefits under the § 409(a) remedial provisions of ERISA where a fund fiduciary had breached his or her duty to the fund was not barred by the anti-alienation section of ERISA. *See Crawford, supra*, 815 F.2d at 119-120; *Solmsen, supra*, 743 F. Supp. at 129. Moreover, and again unlike *Herberger*, the decisions in *Crawford* and *Solmsen* contain extensive statutory analysis of ERISA. *See Crawford, supra*, 815 F.2d at 119-120; *Solmsen, supra*, 743 F. Supp. at 128-129. Thus, in following the holdings in *Crawford* and *Solmsen*, the Third Circuit chose to adhere to well-reasoned decisions which comport fully with *Guidry* on these seldom-litigated issues. No review by this Court is appropriate where the court of appeals correctly interpreted the statute at issue on an obscure, and infrequently presented question.

III.

THE THIRD CIRCUIT'S OPINION AVOIDED AN ABSURD RESULT THAT WOULD HAVE SUBVERTED THE PROTECTION OF BENEFICIARIES THAT IS AMONG THE PRIMARY PURPOSES OF ERISA.

Petitioner argues that the court of appeals ignored *Guidry* and the plain meaning of the statute in order to reach a decision that comported with its view of the equities (Pet. 19-20). This argument misconstrues the decision below which effectuates the remedial provisions in ERISA itself, rather than general equitable principles. As demonstrated above, the court of appeals was careful to adhere both to *Guidry* and to the plain meaning of the statute.

Both the majority and the concurrence below recognized that ERISA was enacted "to protect and ensure the availability of pension funds for retirees." *Coar, supra,* 990 F.2d at 1425 (Pet. App. Pa 35) (Becker, J., concurring). Petitioner defrauded the Fund out of more than $25 million, far more than he could ever have expected to collect in pension benefits. In effect, he has deprived the Fund's beneficiaries of assets and income to which they were rightfully entitled. Allowing him now to obtain more money from the Fund, above and beyond the vast amounts he has already removed by fraud, would completely subvert the purpose of ERISA.

Petitioner also attempts to present a "parade of horribles" to raise the truly absurd claim that the decision below will be harsh on "innocent" trustees (Pet. 7-10). However, in the nineteen-year history of ERISA, *none* of the four cases that have dealt with this issue have involved so-called "innocent" or merely "negligent" trustees, but rather have involved wrongdoers who have intentionally misappropriated Plan assets. *See supra* at 16-17. Petitioner's argument as to so-called "innocent" trustees is thus a red herring based on pure conjecture and speculation.

Furthermore, the gravity and importance of trustees' responsibilities should be no surprise to those individuals who voluntarily seek the office. Prospective trustees should not be encouraged to take such responsibility lightly. Under petitioner's reading of ERISA, only trustees who are wealthy and possessed of substantial non-benefit assets would be expected to make good any losses they cause the Fund. The more rational reading of the statute, and that embraced by the court below, holds trustees to the duty they undertook when they agreed to serve the Fund, regardless of their wealth, and encourages them to take the well-advised step of procuring the appropriate "Trustee and Officer" insurance to indemnify themselves against their own negligence. Along with the power of their position, trustees must also bear the

responsibility. Making trustee benefits subject to § 409(a) would only make "innocent" trustees more prudent and dishonest trustees more wary of abusing their position.

Finally, the court of appeals was not "giving in" to its own distaste for petitioner's criminal misdeeds. To the contrary, the Third Circuit simply applied traditional rules of statutory construction. Nevertheless, as the concurring opinion below noted, petitioner's construction of § 206(d)(1) — permitting a trustee to loot the funds of a Plan, and then to go back to the Plan with impunity to take out additional amounts for his "benefits" — reaches an "absurd" result which could not have been intended by Congress. *See Coar, supra,* 990 F.2d at 1425 (Pet. App. Pa 33-35) (Becker, J., concurring). *Demarest v. Manspeaker,* 498 U.S. 184 (1991) (an anomalous or absurd result should be rejected as plainly unintended by Congress).[10]

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10. Petitioner argues at length that the effect of the decision below when applied generally will be to inflict unjust losses upon basically "innocent" parties. (Pet. 7-10). However, petitioner does not address the effect of a decision in his favor. In cases dealing with single employer plans where the trustee is also the employer's principal *(see, e.g., Crawford, supra,* and *Solmsen, supra),* the trustee usually would be a substantial beneficiary of the plan. In such situations, where a trustee loots the fund in violation of his or her fiduciary duty, under petitioner's construction of ERISA, that same trustee would also be able to make a claim for benefits upon the very fund he or she had looted. Indeed, the breaching trustee, as the principal of the employer, is also likely to have a larger monthly benefit than most fund participants, further depleting the Fund. In fact, in the small plan context, the defrauding trustee could steal and take as benefits sufficient monies to completely deplete all plan assets. The result of this would be to doubly reward the wrongdoer and, more importantly, to shift entirely the economic risk of loss on to truly innocent plan participants.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF ORAL ARGUMENT DATED MARCH 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PHILADELPHIA COUNTY, PENNSYLVANIA

* * *

NOS. 92-5356/5359/5438/5439

ROBERT J. COAR

VS.

JOSEPH KAZIMIR; ROCCO MORONGELLO, in their Capacity as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO D'SANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUKIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato D'Santi and Robert Dukik, in their capacity as Trustees of the Pension Fund Mid-Jersey Trucking Industry Local 701 and the Pension Fund Mid-Jersey Trucking Industry Local 701,

Appellants No. 92-5356/5438

Robert Coar,

Appellant No. 92-5359/5439

* * *

Appendix A

[2] * * *

Transcription from tape of an oral argument, which took place on March 9, 1993, beginning approximately 10:45 a.m., in the above-captioned matter. Transcription from tape taken at United States Court of Appeals For The Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106-1790, on Wednesday, March 10, 1993, beginning at 9:00 a.m., before CHRISTINE L. ALLMOND, Court Reporter and Notary Public, in and for the Commonwealth of Pennsylvania.

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Appendix A

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MORTON I. GREENBERG

JOSEPH F. WEIS, JR.

[4] * * *

THE COURT #1: Mr. Kaplan, Mr. Perle, fortunately this case is much simpler, maybe more difficult, but you got a simple clear-cut issue.

MR. KAPLAN: I think that's correct, Your Honor. My name is Roger Kaplan and I represent the appellants in this case, which

include the Pension Fund for the Mid-Jersey Trucking Industry, Local 701 and its trustees which have been named as defendants in this case.

Your Honor, I would like two minutes of rebuttal.

THE COURT #1: Permission granted.

MR. KAPLAN: Thank you. Now, Your Honor, the facts of the case are not terribly in dispute, but we have a former trustee who was ultimately convicted of RICO violation with respect to his tenure at the fund. And the predicate acts were the soliciting and receipt of kickbacks in connection with depleting twenty million dollars out of the fund. Ultimately, the fund also had obtained a [5] judgment, a civil judgment against that trustee in the amount of twenty-six million dollars on the ERISA claim and ninety-six million dollars on the RICO claim. After liability was established in the District Court on summary judgment the trustees of the fund determined to exercise a right of set-off and recoupment to stop paying that trustee his benefits on a monthly basis. The issue raised in the case is the issue that was not determined in *Guidry versus Sheet Metal Workers Pension Fund or Sheet Metal Workers National Pension Fund.*

THE COURT #1: Mr. Kaplan, even though *Guidry* reserved this precise question, what is it about the reasoning that would allow us to come to a different result from *Guidry*?

MR. KAPLAN: Your Honor, the reasoning of *Guidry* is what requires the court to come to the result in this case that we advocate for the following reasons — and I intend, Your Honor, to address my remarks almost exclusively to that question today, because we are not asking the Court to find and nor does [6] this Court need to

find an equitable exception to 206(d)(1). The last part of the Supreme Court decision in *Guidry* and the dicta in the *Patterson/Schumate* case is entirely irrelevant to what this Court needs to decide with respect to the statutory construction of Section 409(a), on the one hand in ERISA and Section 206(d)(1).

We are not asking for an equitable exception which would fit within the dicta of *Guidry*. What we are asking for is that this court construe 409(a) pursuant to traditional methods of statutory construction in order to divine the congressional intent.

THE COURT #1: Isn't the argument simply the 409(a) is specific? That there's a liability and the other section is just a general exemption?

MR. KAPLAN: Absolutely, Your Honor.

THE COURT #1: And, therefore, when you take the specific general dichotomy it works for you in this case rather than against you.

MR. KAPLAN: I — Absolutely.

THE COURT #1: Isn't that — isn't that [7] your whole — isn't it that simple?

MR. KAPLAN: Well, Your Honor, I wouldn't sit down after saying that, but I think that's a major part of the argument. *Guidry* starts with the proposition at page — at 375 to 76 of that decision which says, when "there is no clear intention otherwise that a specific statute will not be controlled and nullified by a general". In that case a court found that 501(b) of the LMRDA, which simply said, damages and other appropriate relief, was a general statute in

another statutory scheme, which could not countermand 206(d)(1) as an anti-garnishment statute. The court further held, and I think this is very important, it did not say that anti-alienation was immutable. That it always wins. What it said was, in that case, and quoting again, "the congressional intent would be effectuated — would not be effectuated by reading the LMRDA general reference to other appropriate relief as overriding the anti-garnishment provision of 206(d)(1). In this case the congressional intent is just the opposite.

[8] THE COURT #1: What do we do about the court decision around page 376, where it said there's a considered congressional policy to safeguard a stream of income for pensioners, even if that decision prevents others from securing relief for the wrong done to them.

MR. KAPLAN: Your Honor, the reason —that has to do with third parties seeking an attachment, an execution or a levy because —

THE COURT #1: They don 't —

MR. KAPLAN: Your Honor, with all due —

THE COURT #1: That's your argument?

MR. KAPLAN: It' s more than my argument —

THE COURT #1: The Court did not precede its discussion by saying that it applied only to third parties.

MR. KAPLAN: Well, Your Honor, the court did precede the discussion at pages 371 and 72, and specifically footnote ten, it

started with a definition of alienation as contained in the Treasury Regs, the Treasury Regs define — and the Treasury Regs relied on in our brief and our addendum to our brief. The [9] Treasury Regs define alienation and assignment as any direct or indirect arrangement whereby a party acquires a right or interest enforceable against the plan. It is a party acquiring a right or interest against a plan. By definition, alienation or assignment is a third party seeking to enforce its right or claim against the participant against the plan. That definition does not include actions by the plan itself, vis-a-vis the participants.

In fact, Your Honor, in the very next section of the regulations, the Treasury Regs give examples of situations which do not fall within its definition of alienation and assignment. Each and every one of those examples is a situation in which the fund itself is withholding the benefit from the participant.

The principal example of which is an arrangement by the fund to withhold future benefits in order to recoup overpayments of benefits in the past.

What's interesting in the Treasury Regs [10] is that that's not defined as an exception to alienation or assignment. It is defined as not being included within the definition of alienation or assignment.

Your Honor, what took place in the Supreme Court in *Guidry* was an — and the Supreme Court looked at the Treasury Regs to say that what is being attempted here is a constructive trust by a third party, which is the same thing as garnishment. Garnishment falls within the definition of alienation or assignment under the Treasury Regs.

THE COURT #1: Was the creditor in *Guidry* in any different

position than say a credit card company trying to collect?

MR. KAPLAN: No, exactly the same.

THE COURT #1: The fact that it was a union, still it's a separate entity.

MR. KAPLAN: In the eyes of the Supreme Court it was a — it was — in fact, the Supreme Court, I don't have the page, but the Supreme Court in *Guidry* specifically said, although, there is a tendency to, in fuzzy thinking, think of the union and the Pension [11] Fund as sort of the same, they are distinct, separate legal entities —

THE COURT #1: One more question, if you are right on your appeal then the other appeal is dead, right? It's the counsel fee appeal.

MR. KAPLAN: The counsel fee is dead, that's correct.

THE COURT #1: Okay.

MR. KAPLAN: Am I still on green?

THE COURT #1: You're still on green, that was a mistake.

MR. KAPLAN: Okay. Your Honor, let me —so, I think, looking at the Treasury Regs and applying Chevron and giving deference to the agency that has primary jurisdiction over this section, I think we have to defer to the agency's definition of alienation and assignment. And an issue is not even raised in this case concerning alienation or assignment as defined under the Reg. The second question that deals with statutory construction is the

issue that Judge Greenberg raised at the beginning of my presentation. And that's that section 409(a) is in fact a [12] specific statute which is very different than 501(b) of the LMRDA. Section 409(a) specifically places an obligation on the fiduciary and says that that fiduciary who is in breach, quote, "shall be" — "shall personally be liable to make good to such plan in any losses, shall restore to such plan any profits which the fiduciary made and shall be subject to such other appropriate equitable and remedial relief". The legislative history with respect to section 409(a), which is analyzed at length in *Crawford*, which is relied upon in our brief.

In *Crawford,* Judge Green looks at that legislative history and it's clear that Congress intended section 409(a) to provide the full range of all available remedies to remedy a breach of fiduciary duty. In fact, the legislative history demonstrates that the fiduciary duty sections of ERISA were the very centerpiece, the very centerpiece of the ERISA statute in 1974.

Crawford further notes as does the Supreme Court at length in *Firestone versus* [13] *Bruch* decided a year before Guidry, that ERISA's legislative history — I am quoting from *Bruch*, "ERISA's legislative history confirmed that the Act's fiduciary responsibility provisions codify and make applicable to ERISA fiduciary principles developed in the evolution of the law of trusts". And as Judge Green notes, in Crawford, the law of trusts clearly gives a trustee a set-off and recoupment remedy against a breaching trustee who also happens to be a fiduciary. Scott is very clear on that on the law of trusts.

The situation we're faced with is that if the Court finds against us we have the incongruous result, which was rejected by the Supreme Court in Firestone, the incongruous result that we had more protection against fiduciary breaches pre-ERISA under

common law than we would had under ERISA, under the statute, if it's construed that 409(a) does not take precedence over 206(d)(1).

THE COURT #1: Yes, but 206(d)(1) was passed by Congress.

[14] MR. KAPLAN: There's no question, Your Honor —

THE COURT #1: I mean, that's just tough luck.

MR. KAPLAN: I understand that, but there is no question in my mind, based upon this legislative history, that Congress never intended a breaching fiduciary to deplete the assets of a Pension Fund as he did in this case.

For example, in *Solmsen,* which we rely on, the fiduciary was responsible for depleting 60 percent of the assets of the fund. If this Court finds against us it means that that fiduciary having depleted the assets of the fund can go back to the well a second time. In *Solmsen,* the fiduciary, and typically in a single firm trust, the fiduciary is the highest paid employee in the company and it's usually the CEO. The fiduciary can go back and dip into that fund again. In Solmsen he was going after the second 40 percent. He would leave nothing —

THE COURT #1: That's not going to happen [15] here.

MR. KAPLAN: But, Your Honor, I know it's not, but the point is we're arguing a legal principle that would have the same application in that case that it would in this case. There's no question — and I think *Firestone* really answers the point, In *Firestone v. Bruch,* the Court refused to apply a universal, arbitrary and capricious standard for review of fiduciary action. A principal reason, at page 114 of that opinion is, that by adopting that standard ERISA would require us to impose a standard that would afford

less protection than enjoyed before ERISA was adopted. I think that answers the argument, Your Honor.

Now, with respect — with respect to the statutory intent on 409(a), if I may take a couple of minutes. I think the only case that supports the appellee's position is the *Herberger* case. *Herberger* is interesting because it completely, utterly —

THE COURT #1: It's the only Court of Appeals case after *Guidry.*

MR. KAPLAN: It is, but it completely and [16] utterly misread *Guidry* and got *Guidry* backwards, Your Honor. The reason why is, first, it looks at *Crawford* and says *Crawford is* persuasive. However, I am compelled to reach a different result because *Guidry* compels me to do so. It then reads *Guidry* and says two things about *Guidry,* it says number one, *Guidry* dealt with an offset and disallowed an offset. *Guidry* did not deal with an offset argument. *Guidry* dealt with a constructive trust, which the Supreme Court said was a garnishment. I am referring to page 803 to 804 of the *Herberger* decision. Next, compounding that error, the 5th Circuit in *Herberger* said, this is how it summarizes the *Guidry* decision, and I am quoting, "specifically, the Court in *Guidry* stated, that the remedial provisions of ERISA did not outweigh the anti-alienation provision". Still quoting, "in *Guidry* the Supreme Court held that the civil enforcement provision of ERISA under section 1132(a)(3) was not expansive enough to allow an offset". In other words, the *Herberger* Court thought, [17] based upon its decision, that the Supreme Court was looking at a tension between 1132(a)(3) under ERISA and 206(d)(1). The *Herberger* Court completely missed the point that the Court was not weighing an ERISA provision against an ERISA provision. The court in *Guidry* was weighing 501(b) of the LMRDA, a completely different statutory scheme, against 206(d)(1).

THE COURT #1: They didn't read it right, but I guess you're — as we sit here now, there's a conflict among the circuits, isn't there? Between *Crawford* — there's already a conflict among the circuits.

MR. KAPLAN: There is a case in the Eastern District of New York, Judge Nickerson —

THE COURT #2: That's the one that won your case. That went your —

THE COURT #1: Yes, but I mean among the Courts of Appeals there's a conflict?

MR. KAPLAN: There is a conflict, except the conflict, to be perfectly accurate —

THE COURT #1: But one case is [18] pre-*Guidry*?

MR. KAPLAN: That's right. Although, I think the *Crawford* analysis is completely consistent —

THE COURT #1: But what was Judge Nickerson's analysis? Judge Nickerson's analysis was a smell test. He couldn't stand the result and I can understand it. I think it is — I think it is a terribly unpalatable result to decide against you.

MR. KAPLAN: Judge Nickerson may have applied the smell test, but what he articulated was that he examined the decision in *Crawford* and he examined the decision in *Herberger* and he came to the conclusion that the *Crawford* decision, based upon its in-depth analysis of the legislative history was the correct analysis. And that that analysis survived *Guidry* and which incidentally

specifically reserved on this issue. So whatever *Guidry* said about equitable principles did not stop it from reserving on the issue.

Your Honor, if I may conclude, the [19] original point, we're not asking this Court to give the Pension Fund a remedy against whatever survivors or survivorship interests may come after Mr. Coar — after Mr. Coar, his spouse or his children if they have survivorship interests. We are solely seeking a remedy that as Mr. Coar's monthly benefits come due that the fund is permitted to set that off. A set off in equity is simply a defense. A recoupment and set off is not the assertion of a claim, it is our defense.

THE COURT #1: So, is what you are saying, Mr. Kaplan, that if something unfortunate should happen and Mr. Coar should no longer be with us a year from now, then you'd no longer have a set off, but it would go to his family?

MR. KAPLAN: I am saying that the only issue raised in this case is our right to a set off and recoupment with respect to the benefits that are due Mr. Coar. We've never suggested in this case or anywhere else, Your Honor, that we would have any right of recoupment or set off with respect to other [20] persons, either a surviving spouse or his children.

THE COURT #1: Okay.

MR. KAPLAN: And, in fact, the letters that preceded this case asserted the position on behalf of the fund, which ultimately led to the litigation that we were seeking to set off his benefits only.

THE COURT #1: We understand your position.

MR. KAPLAN: Thank you.

Appendix A

THE COURT #1: Mr. Perle.

MR. PERLE: Your Honor, I would like to reserve recross of rebuttal.

THE COURT #1: No, you —

THE COURT #2: He's got a cross appeal.

THE COURT #1: You got a cross appeal on your counsel fee.

MR. PERLE: Your Honor, what I would like to do is address anti-alienation (ph) first and then proceed to the *Ursic, Ellison* question.

THE COURT #1: Well, you better — you're not going to get to *Ursic, Ellison* unless [21] you —

MR. PERLE: I recognize that. Taking a look at 409(a) I think — the basic premise or necessary premise for the argument is that, in fact, the text clearly does indicate, does compel or indicate an intent to apply a remedy against pension benefits as it would be received by a fiduciary, it doesn't do that. It speaks in broad terms. What it really does is simply create a cause of action, it indicates that breach of fiduciary duty — breach of an ERISA duty creates a right of a general right of recovery on behalf of the pension fund.

THE COURT #1: Wouldn't it be like just the bare minimum then that if the recovery is established and the liability is fixed, which it is for multi-millions of dollars, that at a bare minimum when you wouldn't have to pay other money to the judgment debtor. It would seem — it would seem so clear that — it's so specific that you owe the money.

MR. PERLE: Your Honor, I think what you're doing, with all due respect, is what [22] Judge Nickerson did, he's saying this doesn't look right, it's not fair.

THE COURT #1: He said it stinks.

MR. PERLE: It stinks.

THE COURT #1: Is that wrong? Incidentally, is it wrong to see if something does stink when you are reading along?

MR. PERLE: There is nothing wrong with it, Your Honor. As a matter of fact, in this case, and I think what is appealing in terms of the argument in front of you — argument of the fund, is that there's a symmetry here unlike with another creditor. There is a symmetry, I hope you see that. And that's — I think where their argument has a special appeal. But I think if you look at the text of 409(a), what it does is create a cause of action. It also speaks in general terms about equitable relief. It doesn't say anything about overcoming the alienation provision. Now, when the fund — when the fund takes the position that it is taking in this case, it's taking the position as a creditor, it's not taking it internally. In the matters that are [23] addressed in the Treasury Regs those are situations that deal with administrative mistakes by the fund, where there has been an overpayment. So in effect, when they talk about recoupment, all they are saying is we don't want to pay the same thing twice. We're saying that pension has already been paid. That's all those cases talk about, which is why they don't deal with alienation.

The fund, in this case, is wearing two hats. It's the payor of the pension and it's the creditor. If you look at 409(a) it creates a cause of action. It doesn't say how you collect it. I think the same point is

made — was made in *Guidry,* because the text of the pertinent provision of the LMRDA is very similar to 409(a). It creates a cause of action. The point is made very clear by the Court. That's all it does. It talks generally about how equitable relief is available, but in 409(a) I think it's particularly instructive that there's a reference there or the interpretation there usually provided is the right of a person in a [24] pension fund or the trustees to take action against an (inaudible) fiduciary (inaudible). And I think that's the clear purpose of the equitable relief language there, but 409(a) doesn't deal with the specific situation we have here.

I think what is very instructive is what the Supreme Court said in *Patterson versus Schumate,* which came out after *Guidry* last year. I think what they said was, we really meant it when we said no equitable exceptions. It's up to Congress they pointed to — they pointed to what Congress had done with respect to matrimonial support orders, when Congress enacted a specific statute to overcome what would have been the rule under 206. And in effect said, if you don't like the result in this case, you don't like the result in *Guidry* or another case it's up to Congress — to petition Congress, get Congress to change the law. No equitable exceptions.

Now, I think when you look at *Crawford,* you look — certainly when you look at the *Solmsen* case, what they are are basically an [25] appeal to some notion of fundamental justice. It's not right, it stinks, it's unconscionable, it's unpalatable. All the adjectives that Judge Barry — that are replete in Judge Barry's opinion, but unlike the Court there, I think, Judge Barry, unlike the Court in *Solmsen,* I think Barry correctly recognized that *Guidry* and more lately in *Patterson versus Schumate,* the Supreme Court said no equitable exception, but what you are talking about under any guise is an equitable exception. There's no difference when a pension fund is a

creditor from the position of the union in *Guidry.* Certainly the equities, the equities here are virtually indistinguishable.

THE COURT #1: Mr. Perle, would you engage Mr. Kaplan's argument a little more directly? His statutory construction argument.

MR. PERLE: I think the statutory construction argument basically — or assumes that 409(a) — 409(a) in some way addresses the particular result that he is seeking here. [26] Mainly that pension benefits — that pension benefits are — can be effectively garnished, garnishee on behalf of the pension fund when a pension fund alone or creditors has the judgment. I don't think the text says that or suggests it in other than a most general term. So, I think — I think we then are — go back to the principle clearly articulated in *Guidry,* which is that the only exceptions — there are no equitable exceptions, no exceptions that can be read into the text, that based on some doctrine which has been handed down from common law, the only exceptions are exceptions that have been inscribed in the statute by Congress that are specific, that say exactly what you want and what you maintain they should say, as Congress did with respect to matrimonial lawyers in '84 when they amended the statute.

And I think the problem that Mr. Kaplan has is that — is the particular provision he's talking about goes no further than the equivalent provision in *Guidry,* under the LMRDA.

[27] THE COURT #1: Labor Management, Reporting and Disclosure Act.

MR. PERLE: Labor Management Reporting and Disclosure Act. They are virtually identical. And I think what the Courts in

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Patterson versus Schumate said, if we allow an exception based on a federal statute creating a remedy, instead he calls a federal statute has created a remedy, pretty soon you have an exception which swallows the whole rule. At least the creditor's rights have been established under federal law. And I just don't see *Patterson* as being capable of being read as anything other than a general, across-the-board, rejection of the kind of equity based analysis that Mr. Kaplan is offering. If the statutes say among the remedies we contemplate is the right of a pension fund to attach or garnishee pension benefits of the pensioner, I would concede that Congress has spoken and indicated an intent to permit the pension fund to do what it is intended to do in this case. They didn't do that in 409(a). They spoke only in [28] the most in general terms. They created a cause of action. They said if you breach fiduciary duty as defined under ERISA, if you're an ERISA fiduciary and breach that duty, you could be liable in damages for two things, one, the loss created. And, two, if it involves kickbacks and what they call profits then for a return of any profits.

THE COURT #1: You see a gap here? It's our duty, isn't it, if there's a gap in the congressional scheme to try and figure out what we think Congress' likely intent would be?

MR. PERLE: Your Honor, I would agree if it's in an area where the Courts have been inactive particularly the Supreme Court. But I think the Supreme Court has given general guidance.

THE COURT #1: May I ask you a question? You have a cross appeal here with respect to the counsel fee. If I recall this correctly, Judge Barry first indicated that you would get a fee, but she didn't quantify the amount. And then on a reconsideration she said you [29] would not get a fee; is that correct? What's the standard of review?

MR. PERLE: The standard of review, I believe, is plenary review because I think Judge Barry misconstrued the applicable stands. This really —

THE COURT #1: That's got nothing to do with her changing her mind.

MR. PERLE: That has nothing to do with changing her mind.

THE COURT #1: She certainly has the right to change her mind.

MR. PERLE: Yes, certainly had a right to change her mind. But what she said was, "I don't think I have discretion here to award the fees". Mainly she went down —

THE COURT #1: Generally speaking, the counsel fee awards or refusal to make counsel fee awards is abuse of discretion. What you are saying is that she made some legal errors here in her understanding of the *Ursic* — that's Judge Weis' test?

MR. PERLE: That's correct, Your Honor. And I think she made a legal error in this [30] respect. *Ursic* — the *Ursic* test was drawn from two prior cases, *Iron Workers versus Boeing* and the *Hummel* case out of the 9th Circuit. They set forth the five part test.

THE COURT #1: You're disappointing me, I though he thought it up himself.

MR. PERLE: Well, he may — certainly (inaudible), Your Honor, but I don't think Judge Weis needed to deal with the issue we're dealing with here. In *Boeing* the fourth factor was articulated on the basis — and *Hummel* was articulated on the basis of that

benefits the numbers of the claimants as a whole. Or to resolve an important question under ERISA. Same standard under *Hummel.*

Now, I think what's interesting is that in *Ellison*, what the Court said there was we can't really treat — we don't think that you should apply the special circumstances test because we view ERISA cases as generally or the typical ERISA case as generally different than civil rights cases, they don't involve transcendent questions of national policy and so forth. And they don't involve benefit [31] calculations and so on. And the Court dwelled on that as — and cited *Boeing.*

THE COURT #1: Well, then that analysis is applicable here.

MR. PERLE: It's not applicable here.

THE COURT #1: This is sort of a very narrow question here. You know you may say that's a great issue. And I suspect, Mr. Perle, that if we decide this against you, we will in effect be handing you a prize ticket that very few lawyers get in a lifetime.

MR. PERLE: Well, I am not —

THE COURT #1: A ticket to the United States Supreme Court.

MR. PERLE: Well, I am not here to accept a ticket, but I think what's important, Your Honor, has touched on it, this is a case which has national significance, which could very likely go to the Supreme Court, which will be instructive to every pension fund across the —

THE COURT #1: If we decide against you it's going there, believe me.

[32] THE COURT #2: Well, I mean how often does this problem come up?

MR. PERLE: Your Honor, it comes up much more often than you would expect.

THE COURT #1: That's grim.

MR. PERLE: It doesn't always come up in the Bob Coar cases, Your Honor. It comes up probably much more often in situations where you have an incumbent board of trustees who decide, after they have been in office a few months, that the old people have done a lot of questionable things and start lawsuits against them based sometimes on rather technical, alleged technical violations of ERISA. You wind up with somebody who is 68-years-old who is not working, living on a pension, having to defend a large lawsuit based on his service as a trustee. That's the reality of the situation.

THE COURT #1: But the court case — that's not the court case unless and until the trustees get the judgment. In other words — in other words, the mere fact the suit was brought they never took the position that, [33] if I understand this, they didn't say that they could withhold the payment until after they got a judgment.

MR. PERLE: One — one other — you're — no, they didn't have a judgment, Your Honor, they withheld payment before they got the judgment. There was a partial summary judgment on liability only.

THE COURT #1: All right.

MR. PERLE: And began withholding payments.

THE COURT #1: But this case was unique, though your client went to jail for what they did against the fund.

MR. PERLE: It was unique — it was unique, but the principles are the same. It's identical really to *Guidry.* But apart from that any time there is a judgment against a former fiduciary you're exactly in the same situation. It may not be as unpalatable —

THE COURT #1: If — only if the judgment creditor is the fund.

MR. PERLE: Only if the judgment creditor is the fund.

[34] THE COURT #1: Mr. Perle, the counsel fee issue has been extremely well briefed. I — are you willing to leave it to the briefs or —

MR. PERLE: I would like to make a point on your *Ellison,* in that I think what *Ellison* was really talking about when it discussed *Boeing* was how *Boeing* dealt with the case which were counsel fees should be paid, not because of the benefit to the claim itself, but because of the national significance. The vindication of purposes of ERISA (inaudible) talks about that. And I think the reason it never comes up in this circuit is because every case, probably the closest case that — there was a case attempted to the court to deal with the issue is the *Brose* (ph) case, Your Honor, but that case was decided on the basis that there was a clear benefit to the members of the plan as a whole. I don't think there's ever been a case where the issue is significant to the case or not important to the case resides in the fact that it involves an issue, which is of national importance and [35] transcends importance.

THE COURT #1: We have your position. Thank you, Mr. Perle. Mr. Kaplan?

MR. KAPLAN: Yes, briefly, Your Honor, I agree —

THE COURT #1: You better get on the tape, sir.

MR. KAPLAN: I agree that we've fully covered the attorneys fee in the brief and leave it in the briefs. Just a few points, number one, counsel said that 409(a) creates a cause of action. It does not create the cause of action, 409(a) is in the fiduciary sections of ERISA which imposes the obligation on the fiduciary to restore losses, return profits and be subject to other appropriate equitable and remedial relief. The cause of action to enforce those duties, which are freestanding duties, is found in section 502(a)(3). Unlike section 501(b) of the LMRDA, which does not even create the cause of action on its face with respect to its union, it creates a cause of action in member, but does not create the cause of action in the union itself as *Guidry* [36] recognized in footnote 16 of the decision.

Secondly, when Guidry said at the end of the decision that it is not creating a general — and it used these words, "it is not creating a general equitable exception to ERISA's prohibition in section 206(d)(1) as an anti-garnishment statute", it used those words. We will not create a generalized equitable exception to 206(d)(1) as an anti-garnishment statute. The reason why is they said they felt if they did that in every case a third party creditor could raise the equitable considerations which would swallow the rule. The enforcement of 409(a) pursuant to the legislative history which we've suggested to this Court, would not swallow that rule at all. In fact, we're not seeking a garnishment remedy, the remedy which we have enforced under 409(a) is a recoupment and set off, which

in equity is not a claim at all. It is a defense to Mr. Coar's claim for his benefits. It is a netting now of cross debts.

THE COURT #1: Thank you. This case was extraordinarily well argued —

[37] THE COURT #2: He has a couple minutes left.

THE COURT #1: Your couple of minutes left is on the counsel fee which Mr. Kaplan didn't argue.

THE COURT #2: That's right because it's his cross appeal.

THE COURT #1: This case was extraordinarily argued. We direct counsel to communicate with a clerk and arrange for a transcript of the oral argument. The court will take a five minute recess.

* * *

(Whereupon, the oral argument was concluded.)

* * *

Appendix A

CERTIFICATE

I, CHRISTINE L. ALLMOND, a Court Reporter in and for the Commonwealth of Pennsylvania, hereby certify that the aforegoing is a true and accurate transcript of the oral argument.

I FURTHER CERTIFY that I am neither attorney nor counsel for, nor related to or employed by, any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.

s/ Christine L. Allmond
CHRISTINE L. ALLMOND
COURT REPORTER